2015 IL App (1st) 143218-U

SIXTH DIVISON
September 4, 2015

No. 1-14-3218

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BOB FLOSS, Plaintiff-Appellant, v. CHICAGO ASSOCIATION OF REALTORS® a/k/a THE CHICAGO ASSOCIATION OF REALTORS®, INC., RAFAEL ALVARADO, WAYNE P. CAPLAN, MABEL G. GUZMAN, and GINGER DOWNS, Individually and d/b/a CHICAGO ASSOCATION OF REALTORS®, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 13 L 008030 Honorable Raymond W. Mitchell, Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the dismissal, with prejudice, of plaintiff's suit seeking damages for his removal as president of a volunteer professional organization where he failed to present a sufficient factual basis to support the causes of action asserted against defendants, which included: retaliatory discharge; breach of the organization's by-laws and manual; breach of fiduciary duties; defamation *per se*; and class action.

¶ 2 Plaintiff-appellant, Bob Floss, filed a multi-count, second-amended complaint against defendant-appellees, The Chicago Association of Realtors (association), and certain members of

the association's board of directors (board): Rafael Alvarado, Wayne P. Caplan, Mabel G. Guzman, and Ginger Downs (collectively referred to as the individual defendants). Plaintiff, a realtor, was a member of the association and, eventually, became its president. However, he was removed from the office of president after a special meeting of the board which was called to discuss harassment charges against plaintiff. Plaintiff's suit, which sought damages for his improper removal as president of the association by the board and for other alleged misconduct, was dismissed with prejudice pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)). Because plaintiff's second-amended complaint failed to set forth a sufficient factual basis for recovery under any of the claims asserted therein (retaliatory discharge; breach of by-laws and manual; breach of fiduciary duties; defamation *per se*; and class action), we affirm its dismissal with prejudice.

¶ 3 I. BACKGROUND

¶ 4 The association is a non-for-profit professional organization, with voluntary membership, open to active real estate licensees in the state. The association's structure and rules of proceedings are contained in its by-laws. As set forth in those by-laws, among the objectives of the association are to "promote and maintain high standards of conduct" in the profession. The board, with 19 directors, is the managing and governing body of the association. The officers of the association include a president and a president-elect with each officer having a one-year term. The board elects the president-elect who "ascends to the office of the [president] immediately and automatically upon completion of a term as [president elect]." Under the association's policy manual (manual), the president is the "Chief Volunteer Officer" of the association and serves as the chair of the board.

¶ 5 Article XV of the by-laws pertains to the association's "administrative staff," which

includes a chief executive officer, who "shall be employed and appointed" by the board. All employees of the association are under the supervision and direction of the chief executive officer.

¶ 6 The by-laws, in section 8.13, state that a member of the association may be reprimanded "for harassment of an association employee." The complaint is to be investigated by the president, president-elect and/or vice-president, and a member of the board. If the complaint names the president, the president may not participate in the investigation. Harassment is defined to include:

> "[T]hreatening or obscene language, unwelcome sexual advances, stalking, actions including strikes, shoves, kicks or other similar physical contact, or threats to do the same, or any other conduct with the purpose or effect of unreasonably interfering with the individual's work performance by creating a hostile, intimidating or offensive work environment."

¶ 7 Section 13.2.D.2 of the by-laws require that if a board determines a president is permanently absent or unable to act, and the president does not resign, the president is subject to removal in one of two ways: by the members, or by the board.

¶ 8 Section 13.6 of the by-laws delineates the procedures for the removal of an officer of the association for a "permanent absence or inability to act," *by the members,* as follows:

> "A. **Petition.** A petition (a 'Removal Petition') calling for the removal of the officer and signed by not less than one-third of the Members or a majority of all Directors shall be filed with the Chief Executive Officer. ***
>
> B. **Special Meeting.** A special meeting of the Members shall be held not less than 20 days nor more than 45 days after receipt of the Removal Petition. Notice of the

> special meeting shall be given by the Chief Executive Officer to all Members not less than 10 days prior to the meeting. *** The sole business of the special meeting shall be to consider the charge against the officer, and to decide whether the officer should be removed. All sides shall have a fair opportunity to present their views on the proposed removal."

¶ 9 Sections 13.6 and 13.2.D.2 of the by-laws provide that the president may also be removed by declaration of the board in the event of permanent absence or inability as determined by the board and the president does not voluntarily resign.

¶ 10 Section 18.1.B of the by-laws authorizes the board to hold a special meeting of its directors. A special meeting may be called by the president, or any five directors, by giving two-days' notice to each director. The notice "shall be accompanied by a statement of the purpose of the meeting."

¶ 11 The manual describes various policies of the association. Section 424 of the manual defines the "Whistleblower Policy" as "requir[ing] officers, directors *** to observe high standards of business and personal ethics in the conduct of their duties and responsibilities" on behalf of the association. Each officer and director has the "obligation" to report "questionable or improper accounting or auditing matters" and violations of the law, in writing, "directly to the [c]hair of the [a]udit [s]ubcommittee" and the subcommittee is to address and investigate the reported concerns. Section 424 prohibits retaliation for a report of inappropriate conduct, stating that "no officer, director, volunteer or employee who, in good faith, reports a concern shall be subjected to retaliation[.]"

¶ 12 The association's harassment policy is contained in Section 504 of the manual and states that the association "is committed to maintaining a productive work environment that is free

from discriminating, harassing or disruptive activity." Pursuant to this section, the association prohibits unlawful harassment by any member.

¶ 13 Plaintiff's one-year term was to run from October 2011 to September 2012. However, in July 2012, the board received complaints of harassment against plaintiff and called a special meeting of the board on July 16, 2012. Plaintiff received notice of the special meeting and was informed of the complaints against him.

¶ 14 During the special meeting, plaintiff left the room so that members of the board could then deliberate about the claims against him. After two hours of deliberations, the board asked plaintiff to resign, but he refused. The board then removed plaintiff from his presidency.

¶ 15 On July 15, 2013, plaintiff filed his initial complaint which contained 22 counts, named the association and all members of the board as defendants, and sought relief for the improper termination of his presidency. Defendants moved to dismiss the complaint pursuant to section 2-615 and, in response, plaintiff requested and was granted leave to file an amended complaint. Accordingly, plaintiff filed an amended complaint on December 18, 2013, with a reduced number of defendants and counts. The amended complaint was later dismissed pursuant to defendants' section 2-615 motion to dismiss.

¶ 16 On June 10, 2014, plaintiff filed a thirteen-count, second-amended complaint against the association and the individual defendants, the pleading which is the subject of this appeal. Plaintiff asserted claims against the association for: retaliatory discharge (count I); breach of the whistle blower's policy of the manual (count II); breach of the removal procedures of section 13.6 of the by-laws (count III); defamation *per se* (count IV); and a class action (count IX). Plaintiff also brought defamation *per se* (counts V through VIII), and breach of fiduciary duties (counts X through XIII) actions against each of the individual defendants. The second-amended

complaint included as exhibits the association's by-laws and manual.

¶ 17 In his second-amended complaint, plaintiff generally alleged that the president of the association acts as its public "face and persona." As such, the president makes appearances, gives interviews on behalf of the association, and promotes the association's policies and services. In addition, the president "provides oversight, authority, execution of contracts and financial investments, income, leases, checks, and agreements that bind [the association]."

¶ 18 Plaintiff maintained that, during his term as president in June and July 2012, he learned of "financial improprieties by [the association] that if came to light would be embarrassing, and possibly criminal." Additionally, because the finance committee of the board recommended an independent, forensic audit of the association's financial records, plaintiff called an officers' meeting at which the officers agreed to open the association's financial records for inspection. Plaintiff also alleged that he began investigating the relationship between the association and the Northern Illinois Real Estate Information Network, Inc., a for-profit referral company which holds real estate licenses.

¶ 19 In count I, the retaliatory discharge claim against the association, plaintiff alleged that, as president, he was an employee of the association in that, after his election, the association offered him the position and he accepted that offer. In further support of his claim that he was an employee of the association, plaintiff contended that he had been "trained" by the association's chief financial officer "to understand and manage" its finances; was required to and did fulfill his duties as president as outlined in the by-laws; was provided the "tools, materials, and equipment" to fulfill his duties by the association; and received a monthly stipend of $1,000 and reimbursement for certain business-related expenses.

¶ 20 Plaintiff asserted that the association terminated him in retaliation for his investigations

of questionable financial practices and his request to open the financial records for review. Plaintiff claimed that, as a result of his retaliatory discharge, he "has been damaged."

¶ 21 In count II, plaintiff alleged that the association breached the association's "Whistleblower Policy" contained in section 424 of the manual, which was intended to encourage and enable an officer of the association to raise concerns and not be subject to retaliation. He claimed that the association wrongfully terminated his presidency in retaliation for "reporting" and continuing to investigate financial irregularities, and that, as a result of the association's breach of section 424 of the manual, he "has been damaged."

¶ 22 In count III, plaintiff claimed the association, in removing him from office, had violated section 13.6 of the by-laws, by failing to: file a petition with the required number of members' signatures for his removal as president; provide the required notice of the special meeting to the members; hold a special meeting with members of the association for removal of plaintiff as president within the specified time period; and obtain the required three-fourths vote of the members. Additionally, the board, in violation of the provision of section 13.6.B of the by-laws that "[a]ll sides shall have a fair opportunity to present their views on the proposed removal," denied plaintiff's requests that his attorney and a court reporter be present at the July 16 special meeting. Plaintiff asserted that, as a result of the association's failure to comply with section 13.6 of the by-laws, he "has been damaged."

¶ 23 In counts IV through VIII, plaintiff asserted defamation *per se* claims against the association and the individual defendants which were based on false statements made "negligently and wilfully" by the individual defendants as directors, officers, and members of the board during deliberations at the special meeting. Specifically, plaintiff alleged that defendant Downs, the chief executive officer of the association, made false statements "indicating that

Plaintiff is unable to perform or lacks integrity in performing his employment duties as President of [the association] and a realtor;" "was harassing the staff;" and "was a disgrace to the office of the Presidency." Defendant Alvarado was alleged to have made false statements that plaintiff "was a racist and, as a result, was not competent to carry out the duties" of president and "was harassing the staff." Further, defendant Guzman, the immediate past-president and member of the board, was said to have made false statements that plaintiff was "senile, doesn't know what he is doing" as president; "was not competent to carry out his duties;" and "lacks integrity in performing" his duties as president. Finally, it was alleged that defendant Caplan, made false statements that plaintiff "was a disgrace to the board, can't have him on the board because he was not competent to carry out his duties" as president; was "senile" and "unable to perform or lacks integrity in performing his employment duties" as president; and "was harassing the staff."

¶ 24 Plaintiff alleged in the defamation counts against the association (count IV) and each of the individual defendants (counts V through VII) that the individual defendants knew their statements were false or made them recklessly without regard for the truth and the individual defendants' publication of their false statements to the board during the special meeting was defamatory *per se* and caused or contributed to his removal as president by the board.

¶ 25 In the defamation *per se* count against the association, plaintiff also contended that the news of his "impeachment" was published by the local media in certain publications, including the Chicago Tribune and Chicago Agent Magazine. According to plaintiff, the publication of his termination as the association's president falsely imputed that he lacked integrity and was unable to perform his duties as the association's president and a realtor. Plaintiff's second-amended complaint did not quote, nor describe what words or statements were published, and the alleged publications were not attached to the pleading.

¶ 26 In count IX, the class-action claim against the association, plaintiff alleged that the association has over 11,000 members who pay annual dues and fees and is responsible to its members to "properly allocate and account for the millions of dollars received in the form of dues." Plaintiff contended "on information and belief," that the association "has negligently and willfully mismanaged and misappropriated the members' funds."

¶ 27 Plaintiff asserted that, as a result of the association's "mismanagement and misappropriation of the members' dues," plaintiff and the association's members "have suffered damages." In seeking to state a class action claim, plaintiff alleged that there were questions of law or fact common to the class, and those questions predominate over any individual questions; joinder of the numerous members' claims would be impractical; a class action was the most appropriate method to fairly and efficiently resolve the association's mismanagement and misappropriation of its members' funds; plaintiff's claims as representative party were typical of those of the class; and plaintiff and counsel would fairly and adequately represent the class.

¶ 28 In counts X through XII, plaintiff alleged that the individual defendants, as directors and officers of the association, owed the members and plaintiff fiduciary duties, which included the duty to act with prudence, good faith, sound business judgment, and with the best interests of the association in mind. The individual defendants breached their fiduciary duties by, "among other things: routinely mismanaging [the association's] finances, failing to comply with the terms of [the association's] By-Laws, Policy, and applicable corporate law, and using questionable and improper accounting and auditing [practices]." The individual defendants also breached their "fiduciary duty of care by wrongfully terminating [p]laintiff for reporting and [his] investigation of the questionable and improper accounting and auditing practices." Plaintiff contended that, as "a direct and proximate cause" of the individual defendants' breach of their fiduciary duties, he

"has suffered damage to his reputation and has suffered economic damage."

¶ 29 Defendants moved to dismiss the second-amended complaint pursuant to section 2-615 of the Code. Defendants argued that plaintiff's second-amended complaint, the "third attempt to plead a viable complaint," did not sufficiently allege causes of action. Defendants asked that the second-amended complaint be dismissed, with prejudice, because it suffered from the same defects as the prior complaints. In a five-page order, the circuit court granted defendants' motion and, having found that it was "clear that plaintiff can plead no set of facts entitling him to relief," dismissed plaintiff's second-amended complaint, with prejudice. Plaintiff has appealed.

¶ 30 II. ANALYSIS

¶ 31 On appeal, plaintiff argues that the circuit court erred by dismissing his second-amended complaint, with prejudice, pursuant to defendants' motion to dismiss under section 2-615 as he sufficiently pled the asserted causes of action. Defendants, in response, argue that the allegations of the second-amended complaint, when considered with the attached exhibits, do not state causes of action with sufficient factual specificity.

¶ 32 "A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. [Citation.] In ruling on a section 2-615 motion, only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered. [Citation.] All well-pleaded facts must be taken as true. [Citation.] However, a court cannot accept as true mere conclusions unsupported by specific facts. [Citation.] Exhibits attached to the complaint are considered part of the pleadings. [Citation.] We review an order granting a section 2-615 dismissal *de novo*." (Internal quotation marks omitted.) *Phillips v. DePaul University*, 2014 IL App (1st) 122817, ¶ 24. We will review the counts of the second-amended complaint under these standards.

¶ 33 In count I, plaintiff sought to state a claim against the association for retaliatory discharge. The tort of retaliatory discharge is a limited and narrow cause of action which has been recognized by our supreme court as an exception to the common-law principle that an employer may fire an employee at will, for any or no reason. *Eisenbach v. Esformes*, 221 Ill. App. 3d 440, 442-43 (1991) (citing *Lambert v. City of Lake Forest*, 186 Ill. App. 3d 937, 941 (1989)). " 'To state a valid retaliatory discharge cause of action, an employee must allege that (1) the employer discharged the employee, (2) in retaliation for the employee's activities, and (3) that the discharge violates a clear mandate of public policy.' " *Collins v. Bartlett Park District*, 2013 IL App (2d) 130006, ¶ 31 (quoting *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 500 (2009)). Courts are "constrained to interpret the elements of the retaliatory discharge cause of action narrowly." *Krum v. Chicago National League Ball Club, Inc.*, 365 Ill. App. 3d 785, 789 (2006).

¶ 34 The tort of retaliatory discharge has not been expanded "outside of the *employment* setting." (Emphasis in original.) *New Horizons Electronics Marketing, Inc. v. Clarion Corp. of America*, 203 Ill. App. 3d 332, 336 (1990). The tort was recognized in order to maintain a proper balance "among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out." *Palmateer v. International Harvester Corp.*, 85 Ill. 2d 124, 129 (1981).

¶ 35 The circuit court, in granting defendants' motion to dismiss, found plaintiff had not pled sufficient facts to show he was an employee of the association. Specifically, the circuit court stated:

> "Here, despite making conclusory allegations of offer and acceptance, [plaintiff] has not pled facts to demonstrate an offer of employment or an acceptance thereof, and

> neither the complaint nor the appended exhibits demonstrate that the parties intended to establish an employer-employee relationship. Instead, it is clear that [plaintiff] was nothing more than a member of a voluntary association, elected by the [board] to serve a temporary term as [president]. The [association] gave him a modest stipend and paid for general expenses he incurred in carrying out his duties as president, but he did not receive a salary. Additionally, the [association] did not control the means by which [plaintiff] executed his duties. The 'powers and duties' that [plaintiff] refers to in his complaint are nothing more than general guidelines establishing the perimeters of his role as [president]. They do not provide the type of instruction for carrying out those responsibilities indicative of the control necessary for an employment relationship. As a result, [plaintiff] cannot state a claim for retaliatory discharge."

¶ 36 We agree with the circuit court's reasoning and determination that plaintiff did not sufficiently set forth a factual basis to support his conclusory allegation that he was an employee of the association. The allegations of the second-amended complaint and attached exhibits show plaintiff was a volunteer member of the association and, as president, he was the chief volunteer officer, and not an employee.

¶ 37 Additionally, courts are constrained to narrowly construe the elements of retaliatory discharge. We do not believe the rationale for recognizing the tort of retaliatory discharge would be served by its expansion to the circumstances pled here: the removal of an unsalaried volunteer officer of a not-for-profit professional organization who had been elected by its board to a specific term.

¶ 38 Moreover, plaintiff did not adequately allege that his removal violated public policy. To state a retaliatory discharge action, "[t]he employee must identify a clear and specific mandate of

public policy as opposed to a broad, general, or vague statement that does not provide specific guidance or is prone to multiple interpretations." *Collins,* 2013 IL App (2d) 130006, ¶ 31 (citing *Turner*, 233 Ill. 2d at 503). A complaint which does not identify " 'a clear mandate of public policy that is violated by the employee's discharge *** will not state a cause of action for retaliatory discharge.' " *Id*. (quoting *Turner*, 233 Ill. 2d at 503). The questions of whether a public policy exists, and whether the employee's discharge contravenes that public policy, are questions of law for the court to decide. *Id*. ¶ 32 (citing *Turner*, 233 Ill. 2d at 501).

¶ 39 Plaintiff generally alleged that he learned of and began investigating financial irregularities which "would be embarrassing and possibly criminal" if those irregularities "came to light." Plaintiff never offered any specific factual allegations regarding the alleged irregularities and never stated specific facts as to what his "investigation" entailed. Furthermore, although he alleged that he was terminated by the board in retaliation for both his investigations and request to open the financial records of the association, plaintiff also alleged that the officers of the association agreed to his request to open the records, and it was the board itself which recommended to him an independent forensic audit of the financial records. Plaintiff also alleged that the board held a special meeting to discuss harassment claims against him and, after deliberations, determined he should be removed. These allegations are inconsistent with his conclusory allegation that his termination was retaliatory.

¶ 40 Moreover, "[a]n action that violates public policy " '*must strike at the heart* of a citizen's social rights, duties, and responsibilities before the [retaliatory discharge] will be allowed.' " (Emphasis in original.) *Chicago Commons Ass'n v. Hancock*, 346 Ill. App. 3d 326, 329 (2004) (quoting *Palmateer*, 85 Ill. 2d at 130). The generalities of plaintiff's second-amended complaint show his dispute with the association and the individual defendants was more personal in nature

than one which "strikes at the heart" of significant social and public rights and interests. See *Id*. at 330 (where court collected cases which found grievances of a private, individual, or economic nature do not justify suits for retaliatory discharge). Thus, the failure of plaintiff's second-amended complaint to set forth that a clear mandate of public policy was violated by his termination as a president required this count to be dismissed.

¶ 41 Finally, even if plaintiff had stated a claim for retaliatory discharge, he did not adequately allege the damages which resulted from his termination as president, just months before his one-year term was to end. In count I, as to damages, plaintiff states only that he has been damaged by his wrongful termination; these allegations are insufficient to support a finding that he suffered a viable injury.

¶ 42 In counts II and III, plaintiff claimed the association breached provisions of its by-laws and manual when the board terminated his presidency.

¶ 43 Members of a volunteer organization, such as the association here, "agree[] to abide by the rules and regulations adopted by the organization." *Werst v. Three Fires Council of Boy Scouts of America*, 346 Ill. App. 3d 706, 715 (2004) (quoting *Engel v. Walsh*, 258 Ill. 98, 103 (1913)). Additionally, the by-laws and the manual constitute a contract between the association and its members. *Diamond v. United Food and Commercial Workers Union Local 881*, 329 Ill. App. 3d 519, 524 (2002).

¶ 44 However, it is well recognized that "voluntary associations have great discretion in conducting their internal affairs. Their conduct is subject to judicial review only when they fail to exercise power consistently with their own internal rules or when their conduct violates the fundamental right of a member to a fair hearing. [Citations.] Generally, a court will not interfere with the internal affairs of voluntary associations absent mistake, fraud, collusion or

arbitrariness. [Citation.] If there has been no mistake, fraud, collusion or arbitrariness, our supreme court has endorsed the exercise of jurisdiction only when a substantial property, contract, or other economic right that implicates due process is at stake. [Citation.]" *Finn v. Beverly Country Club*, 289 Ill. App. 3d 565, 568 (1997).

¶ 45 Plaintiff, in his second-amended complaint, does not contend that he was deprived of his fundamental rights to a fair hearing. Moreover, "[o]n the rare occasions when our supreme court has relaxed the rule of non-intrusion in the affairs of voluntary associations" on due-process grounds only, "the court has found a substantial property, contract, or other economic right that implicates due process." *Lee v. Snyder*, 285 Ill. App. 3d 555, 559 (citing *Van Daele v. Vinci*, 51 Ill. 2d 389, 394 (1972)); see also *Finn*, 289 Ill. App. 3d at 568. Plaintiff has not alleged the existence of such rights in the fulfillment of the remainder of his presidency of the association.

¶ 46 Plaintiff's allegations are that the board did not comply with the requirements of the by-laws and the manual in the manner he was removed from office. Under such a claim, "judicial intervention is appropriate only in instances of fraud, mistake, collusion, or arbitrariness." *Diamond*, 329 Ill. App. 3d at 525 (citing *Finn*, 289 Ill. App. 3d at 568). In that there are no allegations of fraud, mistake, or collusion in the second-amended complaint, "arbitrariness appears to be the relevant category here." *Id*.

¶ 47 Plaintiff was elected by the board to serve a one-year term as president of its professional organization. Before his term ended, the board called a special meeting to address claims of harassment against him and plaintiff was given notice of the meeting and of the claims. The by-laws and manual prohibit harassment and requires such claims to be investigated. The board, under the by-laws, had the authority to call the special meeting. Plaintiff was present at the special meeting and was, again, notified of the charges. After two-hours of deliberations the

board gave plaintiff the opportunity to resign before being removed. The contentions of the second-amended complaint do not show that plaintiff was arbitrarily removed.

¶ 48 Plaintiff, however, alleged in count II that the board violated section 424 of the manual's whistleblower policy by terminating his presidency "for reporting the questionable or improper or auditing matters, and for continuing to investigate" these issues. However, plaintiff does not allege specific facts as to the nature of his "reporting" or what his "investigating" entailed. More importantly, plaintiff does not allege that he followed the specific reporting procedures of section 424 which would trigger that section's protections against retaliation. Furthermore, as discussed above, it is not entirely clear from his second-amended complaint that plaintiff's termination was in retaliation in light of the allegations that the board considered deliberations as to the validity of the harassment claims. Thus, plaintiff has not sufficiently set forth that the board violated section 424 or acted arbitrarily in terminating him.

¶ 49 In count III, plaintiff contends the association did not follow the procedures set forth in section 13.6 of the by-laws when he was removed from the presidency. However, section 13.6 removal by a vote of the members applies when a president is found by the board to be permanently absent or permanently unable to fulfill the duties of president. It was not alleged in the second-amended complaint that the board determined plaintiff was permanently absent or unable to fulfill the duties of president. Even if his removal was for a permanent inability to act, section 13.2.D.2 of the by-laws provides that, under such circumstances, the president also may be removed "by declaration" of the board. Section 13.6 emphasizes that its removal procedures are "in addition to removal by the declaration" of the board. Therefore, plaintiff did not sufficiently allege arbitrariness on the part of defendants by their failure to follow the removal procedures by vote of the members under section 13.6 of the by-laws.

¶ 50 On appeal, plaintiff argues for the first time, that the board's actions, in removing him as president, violated section 13.2.D.2 of the by-laws. However, plaintiff may not assert "new factual theories of recovery for the first time on appeal [citation], because issues not raised before the trial court are waived for purposes of appeal." *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 911 (1994) (citing *Handy v. Sears, Roebuck & Co.*, 182 Ill. App. 3d 969, 971 (1989)); *Wilson v. Gorski's Food Fair*, 196 Ill. App. 3d 612, 617 (1990)). We will not consider this argument.

¶ 51 The circuit court, in dismissing the counts alleging breach of the by-laws and the manual, noted that plaintiff "failed to allege any facts, that, if he proved would support the existence of damages." To properly state a breach of contract action, a plaintiff must allege that he suffered damages as a consequence of a defendant's breach of contract. *Westlake Financial Group, Inc. v. CDH-Delnor Health System*, 2015 IL App (2d) 140589, ¶¶ 30, 33 (citing *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 319 (1987)). "Contract damages are measured by the amount of money needed to place the plaintiff in the same position as if the contract had been performed." *Id.* ¶ 30 (citing *In re Illinois Bell Telephone Link-Up II & Late Charge Litigation*, 2013 IL App (1st) 113349, ¶ 19). As to damages, plaintiff alleges, in conclusory language only, that he was damaged by the association's breach of the manual and the by-laws. We agree with the circuit court that contractual damages were not adequately pled.

¶ 52 We examine plaintiff's defamation *per se* claims of counts IV through VII under the following relevant, well-established principles. To state an action for defamation *per se*, a plaintiff must allege: facts showing the defendant made a false statement about the plaintiff; the defendant made an unprivileged publication of that statement to a third party; and that this publication caused damages. *Krasinski v. United Parcel Service, Inc.*, 124 Ill. 2d 483, 490

(1988). "A defamatory statement is one that harms the plaintiff's reputation to the extent it lowers the person in the eyes of the community or deters the community from associating with her or him." *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 38 (citing *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009)). "The preliminary construction of an allegedly defamatory statement is a question of law." *Id*. (citing *Green*, 234 Ill. 2d at 492).

¶ 53 Plaintiff alleges that the individual defendants' statements were defamatory *per se*, meaning the statements were obviously and apparently harmful on their face. *Green*, 234 Ill. 2d at 491. Our supreme court has recognized five categories of statements which are considered defamatory *per se* including, as may be relevant here based on plaintiff's claims, words that impute the plaintiff is unable to perform or lacks integrity in performing his employment duties and words that impute plaintiff lacks the ability or, otherwise, prejudices that person in his profession. *Id*. at 491-92. A defamation *per se* claim, when properly pled, relieves a plaintiff of proving actual damages and, thus, must set forth the alleged false words "with sufficient precision and particularity." *Id*. at 492.

¶ 54 However, even if a statement is defamatory, " '[o]nly statements capable of being proven true or false are actionable; opinions are not.' " *Coghlan*, 2013 IL App (1st) 120891, ¶ 40 (quoting *Moriarty v. Greene*, 315 Ill. App. 3d 225, 233 (2000)). "[T]he first amendment prohibits defamation actions based on loose, figurative language that no reasonable person would believe presented facts." *Id.* (citing *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 397-98 (2008)). To determine whether an alleged defamatory statement can be reasonably interpreted as stating actual facts, the following criteria are considered: "(1) whether the statement has a precise and readily understood meaning, (2) whether the statement is verifiable, and (3) whether the statement's literary or social context signals that it has factual

content." *Id*. (citing *Imperial Apparel, Ltd.*, 227 Ill. 2d at 398). Whether a statement constitutes opinion or fact is a question of law for a court to decide. *Dubinski v. United Airlines Master Executive Council*, 303 Ill. App. 3d 317, 324 (1999) (citing *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 11 (1992)).

¶ 55 In his defamatory *per se* counts, plaintiff contends the individual defendants made false statements while deliberating in a closed session of the board about the harassment claims against him. Those purported statements were that plaintiff "is unable to perform or lacks integrity in performing his employment duties as [p]resident;" "was harassing the staff;" "was a racist, and as a result, was not competent to carry out his duties as [p]resident;" "is senile, doesn't know what he is doing as [p]resident;" "was not competent to carry out his duties as [p]resident;" and "is a disgrace to the board."

¶ 56 The allegations of the complaint give no factual context to these remarks, other than allegations that the remarks were part of the board's deliberations on the harassment claims. The purported defamatory remarks do not include or imply misleading or false factual content. We conclude that the alleged statements were expressions of the individual defendants' opinions as to plaintiff and are not actionable. The individual defendants' statements "while arguably harsh, merely amounts to loose, figurative language that no reasonable person would believe presented facts, and which [are] therefore nonactionable." *Coghlan*, 2013 IL App (1st) 120891, ¶ 50 (citing *Imperial Apparel, Ltd.*, 227 Ill. 2d at 397-98), and ¶ 40 (where this court collected cases finding purported statements that parties associated with plaintiff were "'the biggest crooks on the planet;'" reference to competitor as "'trashy;'" statement that worker who crossed a picket line was a "'traitor;'" remark describing developer's negotiating position as "'blackmail;'" statements describing play as "'a ripoff, a fraud, a scandal, a snake oil job'" were nonactionable opinions).

¶ 57 We note the circuit court found that the remark that plaintiff "was harassing the staff" was not an expression of opinion, but was protected by a qualified privilege under the holding in *Vickers v. Abbott Laboratories*, 308 Ill. App. 3d 393 (1999). The *Vickers* court found that a qualified privilege existed as to statements made during an investigation of sexual harassment in the workplace. The finding of qualified privilege was based on a "compelling interest in ridding workplaces of sexual harassment" which required an investigation of such claims without the fear of defamation liability. *Id*. at 402. However, the second-amended complaint here does not allege, in any way, the nature of the harassment claims against plaintiff.

¶ 58 Moreover, the purported defamatory remark, about plaintiff "harassing the staff," was without any assertion of factual background. We believe the second-amended complaint does not allege what was meant by the term "harassing;" what evidence the individual defendants had or presented as to plaintiff "harassing the staff;" or explain why the individual defendants thought plaintiff was "harassing the staff." See *Jacobson v. Gimbel*, 2013 IL App (2d) 120478, ¶ 38. Therefore, we find this remark was not factual, but was opinion. In that this remark was not actionable, we need not address whether a qualified privilege has application here.

¶ 59 Finally, plaintiff has failed to plead with particularity the defamation *per se* statements which were allegedly published by the association about his termination in several publications. Therefore, these allegations in the defamation *per se* count against the association are wholly inadequate to state a cause of action.

¶ 60 Count IX of plaintiff's second-amended complaint alleges a class action against the association on behalf of its members. Plaintiff maintains that the members of the association have been injured by misallocation of their dues and fees. Count IX does not specify the factual basis for plaintiff's conclusion, "on information and belief," that the association misappropriated

and misallocated members' funds, nor what rules, practices, or laws may have been violated. Additionally, count IX does not set forth a basis to impose liability against the association. On appeal, plaintiff has not defined the cause of action which is the basis for his class action.

¶ 61 A class action is a " 'procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment.' " *Mashall v. City of Chicago*, 2012 IL 112341, ¶ 41 (quoting *Smith v. Illinois Central R.R. Co.*, 223 Ill. 2d 441, 451-52 (2006)). However, the plaintiff is not relieved of the duty to set forth and establish " 'the substantive prerequisites to recovery under a given tort.' " *Id*. Count IX was properly dismissed for failure to provide factual allegations as to the purported financial misconduct and for not setting forth a basis for liability.

¶ 62 Finally, we examine plaintiff's breach of fiduciary duty claims against the individual defendants—counts X through XIII. A plaintiff seeking to assert a breach of fiduciary duty action "must allege the existence of a fiduciary duty, the breach of that duty, and damages proximately caused by the breach." *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶ 73 (citing *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 17).

¶ 63 On appeal, plaintiff argues that the individual defendants breached their fiduciary duties by mismanaging the association's finances, failing to comply with the by-laws and manual "as alleged in the [s]econd [a]mended complaint," and by "wrongfully terminating [p]laintiff for reporting and investigating the questionable and improper accounting and auditing practices."

¶ 64 As to the "mismanaging" of the finances by the board, and as we have already found, plaintiff failed to allege specific facts relating to the association's purported mismanagement of its finances, and how the conduct was improper. Furthermore, and as we have also already found, plaintiff failed to allege a factual basis for his claims that his termination as president

violated the by-laws and manual or was retaliatory. Therefore, even assuming plaintiff has sufficiently pled that the individual defendants owed him fiduciary duties, he has not alleged with factual specificity that these duties were breached.

¶ 65 Plaintiff has not alleged, with factual specificity, that any breach of fiduciary duties caused him damages. As in the other counts of his second-amended complaint where damages must be pled, plaintiff has alleged only conclusions that he has been harmed. Such allegations are fatally deficient.

¶ 66 As to the circuit court's decision to dismiss the entire second-amended complaint, with prejudice, plaintiff has not identified any specific claim of error nor argued on appeal that the defects of the second-amended complaint can be addressed by further amendments. Plaintiff has therefore forfeited any challenge to this issue. Ill. S. Ct. R. 341(h) (eff. Feb. 6, 2013).

¶ 67 III. CONCLUISON

¶ 68 For the reasons stated, we affirm the dismissal of the second-amended complaint with prejudice.

¶ 69 Affirmed.